No. 05-1670

JUL 24 2006
OFFICE OF THE CLERK

In The Supreme Court of the United States

EXXON MOBIL CORPORATION,

Petitioner,

v.

JOSEPH GREFER, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Louisiana Court Of Appeal, Fourth Circuit

BRIEF IN OPPOSITION

STUART H. SMITH
MICHAEL G. STAG
SMITH STAG, L.L.C.
365 Canal Street, Suite 2850
New Orleans, Louisiana 70130
(504) 593-9600

STEPHEN B. MURRAY
(Counsel of Record)
ARTHUR M. MURRAY
MURRAY LAW FIRM
909 Poydras Street, Suite 2550
New Orleans, Louisiana 70112
(504) 525-8100

Attorneys for Respondents

[Additional Counsel On Inside Cover]

ANDREW B. SACKS
JOHN WESTON
LAW OFFICES OF ANDREW B. SACKS AND ASSOCIATES
114 Old York Road
Jenkintown, Pennsylvania 19046
(215) 925-8200

JACK W. HARANG
HARANG & BARKER, L.L.C.
3500 N. Hullen Street
Metairie, Louisiana 70002
(504) 456-8658

RON A. AUSTIN
AUSTIN & ASSOCIATES, L.L.C.
400 Manhattan Avenue
Harvey, Louisiana 70058
(504) 436-7844

RALPH R. ALEXIS, III
PORTEOUS, HAINKEL & JOHNSON, L.L.P
704 Carondelet Street
New Orleans, Louisiana 70130
(504) 581-3838

QUESTION PRESENTED FOR REVIEW

In this case, a Louisiana jury held Exxon Mobil Corporation liable for $56 million dollars in clean-up and restoration costs as a result of Exxon's contamination of the Grefer family's property. In addition, the jury awarded one billion dollars in punitive damages against Exxon.

On appeal the Louisiana Court of Appeal for the Fourth Circuit painstakingly reviewed the facts, and after a determination that Exxon had indeed acted in a manner to warrant the imposition of punitive damages, rigorously and thoughtfully applied U.S. Supreme Court precedents and reduced the jury's punitive damage verdict to $112 million (a 2:1 ratio between punitive damages and compensatory damages).

The sole question presented to the Court is whether this Court should review the Louisiana Fourth Circuit's decision, considering the Fourth Circuit's strict adherence in this case to the principles enunciated by this Honorable Court in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 576-77, 580, 581 (1996); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
A. Factual Background	1
(1) The Grefer Property	1
(2) Exxon's Conduct, Its Motivations For Such Conduct, And The Effect Of Exxon's Conduct On The Grefer Family And Their Property	3
B. Proceedings Below	7
REASONS FOR DENYING THE PETITION	8
I. THE JURY'S CONSIDERATION OF THE RISKS POSED BY EXXON'S CONDUCT TOWARDS NON-PARTIES WAS PROPER; MOREOVER, THE LOUISIANA FOURTH CIRCUIT'S DECISION ENSURED THAT NON-PARTY HARM WAS NOT THE BASIS OF THE PUNITIVE AWARD, AND, CONSEQUENTLY, RESOLUTION OF THIS LAWSUIT SHOULD NOT BE PROLONGED PENDING A DECISION IN THE *WILLIAMS* CASE	11
A. The Fourth Circuit's Decision Is Consistent With *State Farm* And *BMW* In All Respects	11
B. Resolution Of The Issues This Court Deemed Worthy Of Review In *Williams* Would Have No Bearing On The Outcome Of This Case	17

TABLE OF CONTENTS – Continued

Page

II. THIS COURT HAS ALREADY HELD THAT THE STATES MAY CHOOSE THE PROCEDURE THEY DEEM APPROPRIATE TO ENSURE THAT PUNITIVE AWARDS COMPORT WITH DUE PROCESS, AND ANY PURPORTED CONFLICT IN THE LOWER COURTS EITHER IS A BY-PRODUCT OF THAT DISCRETION OR RELATES TO IMPROPER JURY CONSIDERATIONS NOT AT ISSUE IN THIS CASE 20

III. *STATE FARM* DID NOT IMPOSE A 1:1 CAP ON "SUBSTANTIAL" PUNITIVE DAMAGE AWARDS, AND EXXON'S ARGUMENTS THAT THERE IS A CONFLICT IN THE LOWER COURTS RELIES ENTIRELY ON THE EXISTENCE OF SUCH A CAP 24

A. The 2:1 Ratio In This Case Is Entirely Consistent With *State Farm* 24

B. The Fact That Every Substantial Punitive Damage Award Since *State Farm* Has Not Resulted In A 1:1 Ratio Does Not Mean That This Court Needs To Resolve A Conflict In The Lower Courts 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996) ....*passim*

Boeken v. Philip Morris, Inc., 127 Cal. App. 4th 1640, 26 Cal. Rptr. 3d 638 (Cal. App. 2nd Dist. 2005), *cert. denied*, 126 S. Ct. 1567, 164 L.Ed.2d 297, 74 USLW 3308 (2006) 25

Campbell v. State Farm Mut. Auto. Ins. Co., 98 P.3d 409 (Utah), *cert. denied*, 543 U.S. 874 (2004) 24

Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) 22, 23

Exxon Mobil Corp. v. Grefer, stay denied, 126 S. Ct. 2056 (2006) 8, 12

Grefer v. Alpha Technical, et al., 901 So.2d 1117 (La. App. 4th Cir. 2005), *writ denied*, 925 So.2d 1248 (La. 2006) 16

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) 29

Philip Morris USA v. Boeken, cert. denied, 126 S. Ct. 1567, 164 L.Ed.2d 297, 74 USLW 3308 (2006)..... 9, 28, 29

Philip Morris USA v. Williams, cert. granted, 126 S. Ct. 2329 (No. 05-1256) (2006) .....*passim*

Roman Catholic Church of the Archdiocese of New Orleans v. Louisiana Gas Serv. Co., 618 So.2d 874 (La. 1993) 27

Riley v. Salley, 874 So.2d 874 (La. App. 4th Cir. 2004) 23

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) .....*passim*

TABLE OF AUTHORITIES – Continued

Page

Temple v. Liberty Mutual Ins. Co., et al., 330 So.2d 891 (La. 1976) 23

Williams v. Philip Morris, Inc., 127 P.3d 1165 (Or. 2006), *cert. granted in part*, 126 S. Ct. 2329, 74 USLW 3572, 74 USLW 3665, 74 USLW 3668 (2006) 18

STATUTES

Louisiana Civil Code art. 2315.3 ..... 7, 19

Louisiana Admin. Code tit. 33 § 1401 15

Louisiana Rev. Stat. Ann § 30:2025 15

LA. Const. art. 5, § 10(B) 23

OTHER AUTHORITIES

Supreme Court Rule 10 10

WEBSTER'S NEW COLLEGIATE DICTIONARY 569 (7th ed. 1963) 15

PAGE 1 IS MISSING AT TIME OF FILMING

consisted of concentrated Radium-226, Radium-228, and their daughter products, collectively known as Technologically Enhanced Radioactive Material (TERM).[2] At Exxon's direction[3], ITCO cleaned Exxon's pipes and allowed the waste to enter the environment in an uncontrolled fashion. R. 33:14-18, 34:48-52. Specifically, the radioactive scale fell from the pipes onto the ground when the pipes were transported in and around the yard, off-loaded by crane or forklift, and cleaned by both portable and stationary air rattling machines. *Id.*; R. 33:38-41, 34:49; Pl. Ex. 40-50. These rattling machines used high pressure air compressors that generated radioactive dust clouds. R. 33:17-19, 34:38. Aside from the deposit of scale from ITCO's cleaning operations, the radioactive scale in the pipes was also randomly *buried* and used as road and pipe rack building materials throughout the yard daily during all years of operations. R. 33:39-41, 34:48-52; ITCO Ex. 193(D). Estimates of the average amount of scale indicate that as much as *1.5 million pounds* of scale per cleaning machine was dispersed in the yard *each year.* R. 33:26, 29:10. *This waste was never removed from the yard, nor was there any record of a cleanup (of any sort).*

The Grefers first discovered the existence of oilfield radioactive waste on their property on October 29, 1996,

---

[2] The acronym TERM refers to the radioactive scale deposits found in used oilfield drilling pipe. The acronym NORM is also used to describe that condition. See *Grefer v. Alpha Technical,* footnote 11; Petr. App. 12a. The evidence revealed that one of the daughter products of Radium is Lead-210, which is chemically toxic as well as radioactive. The decay of radium also generates Radon gas, which is a known human carcinogen.

[3] Exxon maintained offices at ITCO for its employees who managed materials, oversaw quality control, and supervised ITCO. R. 33:11-12, 46:40-41. The Grefers had no involvement with the industrial activities conducted by ITCO and Exxon on the property. R. 39:115-18.

when Judge Joseph Grefer, one of the four co-owners of the property, received a sampling report and laboratory analysis confirming that the property was contaminated with Radium, a radioactive material. R. 20:4946-48.

(2) Exxon's Conduct, Its Motivations For Such Conduct, And The Effect Of Exxon's Conduct On The Grefer Family And Their Property.

In determining that an award of punitive damages was appropriate in the amount of $112 million, The Fourth Circuit concluded that Exxon's actions in despoiling the Grefer property resulted from its "callous, calculated, despicable and reprehensible conduct during the time-period in question" (Petr. App. 68a.) which showed that Exxon had no concern for human safety, "and even less concern about the property damage it caused" to the Grefer family. Petr. App. 68a. Indeed, the following facts – which, incidentally, were not mentioned in Exxon's Writ Application – clearly support such a finding:

Exxon first learned of NORM contamination in oilfield drilling equipment in 1981, when Occidental Petroleum Corporation discovered it on its platforms in the North Sea. Petr. App. 6a. Following the discovery, the U.K. National Radiological Protection Board ("NRPB") did further testing and identified the radioactive component as Radium-226; Petr. App. 7a. All major oil companies operating in the North Sea, including Exxon, were immediately made aware of Occidental's discovery through the United Kingdom Offshore Operator's Association ("UKOOA") the oil industry trade association. Petr. App. 7a. As a result of Occidental's discovery, the U.K. government held a conference in 1983 for all major oil companies operating in the North Sea, including Exxon, dedicated solely to the NORM problem. Petr. App. 7a.

In 1985, the UKOOA Safety Committee drafted and published safety guidelines and a reference manual that were distributed to all oil companies. The reference manual extensively covered both the identification of radioactive scale in wells and the procedure to follow up on such identification. Petr. App. 7a. Upon reviewing these guidelines, important Exxon officials felt that the guidelines were too onerous, restrictive, inflexible and unreasonable for Exxon's production operations in the United States. Petr. App. 45a. However, Exxon's own hygienist admitted that had Exxon surveyed its U.S. wells sooner than 1986, it would have discovered radium in its wellheads sooner. Petr. App. 45a.

Chevron discovered NORM contamination in its well sites in Mississippi in 1986. In May 1986, after learning of Chevron's discovery, Exxon surveyed its Mississippi well sites and confirmed the presence of radiation in its equipment. Twice Exxon officials were notified that its cleaning contractors had to be informed of the radioactivity, since it posed a health and safety hazard, but Exxon still did nothing to warn them. Petr. App. 45a.

In fact, an internal memorandum written in August, 1986 by Exxon's then Director of Environmental and Regulatory Affairs showed that Exxon's "prime concern" after Chevron's NORM discovery wasn't health and safety or property clean-up – it was to get the oil industry and federal regulatory agencies to "slow down" the investigation into NORM contamination out of fear that the Environmental Protection Agency ("EPA") would increase its regulation and would eliminate the "produced water" exemption under the Resource Conservation Recovery Act ("RCRA"). Under that exemption oil companies such as Exxon are allowed to dispose of water produced during drilling operations in an unregulated manner. Petr. App. 45a-46a.

Exxon's entirely selfish motivations were further demonstrated by evidence that the same Exxon official,[4] at a meeting of Exxon executives concerning NORM in January, 1987, calculated that the loss to Exxon if it were to lose its produced water exemption would be $750 million in the first year and $150 million for each subsequent year. Petr. App. 46a.

At the same meeting several Exxon officials concluded that notifying pipe-cleaning contractors such as ITCO about the health and safety risks of NORM was "premature". Petr. App. 46a. This was contrary to the advice of an Exxon hygienist who had earlier opined that cleaning contractors such as ITCO *had* to be notified of the presence of radioactivity. Petr. App. 7a-8a.

Another confidential memo written by another Exxon executive in October, 1986, showed that Exxon wanted to downplay the NORM problem because of Exxon's potential exposure to litigation. The memo noted that litigation against Chevron by one of its pipe yard contractors had followed Chevron's disclosure of NORM contamination. The same memo noted that ITCO was a potential "look alike" to the Chevron contractor and suggested Exxon perform "low key" radiation exposure measurements. Petr. App. 46a.

Exxon did not send any notification to ITCO until March, 1987 – five months after the October, 1986 memo, and ten months after it had identified the NORM problem at its domestic well sites, *causing further (and still unrestricted) contamination of the Grefer property*. Even then, Exxon downplayed the problem. In a videotape played for ITCO's president, Exxon portrayed the health risks associated with

[4] The same Exxon official also wrote that Chevron's discovery was "nothing new". Petr. App. 45a-46a.

NORM as minor, and the safety procedure guidelines as merely suggestive of taking precautions to avoid breathing or ingesting airborne dust. Petr. App. 46a-47a. *Exxon's inadequate warning did nothing to protect the Grefer property from further contamination or to address the problem already existing at the property.*

Even after Exxon no longer used ITCO as a cleaning contractor, Exxon was aware that contaminated equipment remained stockpiled on the Grefer property and was further aware of the danger posed by NORM-contaminated scale; *yet Exxon took no step to remove its radioactive material from the Grefer property.* Petr. App. 50a-52a.

At no point, did Exxon notify or warn the Grefer family about the contamination at their property. R.20:4946-48. *Rather, Exxon knowingly and intentionally left the Grefer family with a huge mess.* As a result of the radioactive contamination described above, the Grefers' long-held family property was despoiled. Petr. App. 51a. *Exxon's actions financially burdened the Grefers with the task of cleaning up the property.* Petr. App. 51a. That burden, according to the jury, was $56 million (not the $1.5 million market value of the land asserted by Exxon). (Pet. 28). This was less than the estimate of plaintiff's expert, Mr. Stanley Waligora, and more than that of Exxon's expert.[5] Petr. App. 33a-34a. The Fourth Circuit determined that

[5] Mr. Waligora's remediation plan was based not only on State of Louisiana, Department of Environmental Quality Regulations, but also on the more stringent United States Environmental Protection Agency ("EPA") and Nuclear Regulatory Commission ("NRC") guidelines. Petr. App. 33a-34a. Given the twenty-four year history of significant and unrestricted non-homogeneous contamination at the Grefer tract, Mr. Waligora's plan also called for the removal and testing of the top two feet of soil at the site to ensure that the *entire* property was safe. R. 29:22, 29:36, 33:163-64, 33:166.

there was sufficient evidence to support the jury's award, and left the award undisturbed. Petr. App. 61a; 67a-68a. That judgment is now final.[6]

Exxon's actions have not only exposed the Grefers to the expense of defending claims brought by third parties as a result of the contamination of the Grefer property but have also exposed the Grefers to significant potential liabilities. Petr. App. 71a. In fact, a number of suits have already been instituted against the family.

B. Proceedings Below

The Grefers filed the instant suit in August of 1997 to recover damages for the burial, concealment, and disposal of radioactive scale throughout the Grefer tract. They sought compensatory damages for the costs of restoration, general damages associated with the damage to the Grefer tract, and exemplary (punitive) damages under Louisiana Civil Code art. 2315.3. Resp. App. 5a. After a five-week trial, the jury found Exxon 85% at fault, ITCO 5% at fault, and two absent defendants 10% at fault. The jury rendered a verdict of: (1) $56,000,000.00 for the cost of remediating the contamination at the Grefer tract; (2) $145,000.00 in general damages associated with the damage to the Grefer tract; and (3) one billion dollars in punitive damages assessed against Exxon. Both Exxon and ITCO appealed the jury's verdict. The Fourth Circuit affirmed the judgment in its entirety but reduced the punitive award to an amount equal to twice the compensatory damage award. Petr. App. 61a, 67a-69a. Both the

[6] Indeed, Exxon has unconditionally paid that amount, with interest, to the Grefer family. *See* Exxon's Motion For Stay and Renewed Motion For Stay, *ExxonMobil v. Grefer, Joseph, et al*, No. 05A981.

plaintiffs and Exxon applied for Writs of Certiorari to the Louisiana Supreme Court. The Louisiana Supreme Court denied both Writ Applications on March 31, 2006. Petr. App. 73a.

On or about April 5, 2006, seeking to stay execution of the punitive damage award, Exxon filed in the Supreme Court of Louisiana an "Emergency Motion to Stay Execution of Judgment". The court denied the Motion on April 24, 2006. Resp. App. 3a-4a.

On April 27, 2006, Exxon filed a Motion to Stay in this Honorable Court. Justice Scalia denied the Motion on May 1, 2006. *See Exxon Mobil Corporation v. Grefer, Joseph, et al,* No. 05A981. On May 1, 2006, Exxon filed a Renewed Motion to Stay, which was referred to all members of this Court, and was then denied on May 15, 2006. *See Exxon Mobil Corp. v. Grefer,* 126 S. Ct. 2056 (2006).

Exxon now applies to this Honorable Court for a Writ of Certiorari to the Louisiana Court of Appeal, Fourth Circuit.

REASONS FOR DENYING THE PETITION

This Court has already examined the same issues raised by Exxon in its petition, as they relate to this case. *Id.* On May 1, 2006, after having been denied a stay by Justice Scalia, Exxon filed a renewed application for stay, directing it to Justice Kennedy. *Id.* Exxon's renewed application was promptly referred to the entire Court and denied on May 15, 2006. *Id.*

Now, fully appreciating (though not mentioning) the implications of this Court's stay denial, Exxon focuses its brief on an entirely different lawsuit – *Philip Morris USA*

v. Williams, *cert. granted*, 126 S. Ct. 2329 (No. 05-1256) (2006). The reason for this, of course, is that *Williams*, unlike this case, involves issues which the Court has already determined merit review. Indeed, each of Exxon's three "reasons for granting the petition" incorporate a request that a grant of certiorari in this case be tied, in some way, to this Court's ultimate holding in the *Williams* case. Pet. 9, 16, 17, 22, 27, 30. Exxon's hope is that the Court will indefinitely delay an outcome in this case pending a decision in *Williams*, and then, without further review or discussion, send this case back to the Louisiana state court for a new trial on the punitive damages award. Exxon's overt attempt to "piggy back" its way to a grant of certiorari and subsequent reversal in this case is fatally flawed.

First, Exxon assumes that the issues in *Williams* are present in this case. As discussed below, the only common element that the *Williams* case and this case share is that both involve a due process challenge to a punitive award. The issues this Court felt worthy of review in *Williams* are simply not issues in this case.

Second, Exxon ignores the fact that certiorari was granted in *Williams* only fifteen days after the stay application in this case was denied. Presumably, this Court was aware of the issues in the *Williams* case when it denied the stay in this case, yet it did not grant the stay application.

Third, this Court denied certiorari only two months earlier in another smoker personal injury case – *Philip Morris USA v. Boeken*, *cert denied*, 126 S. Ct. 1567, 164 L.Ed.2d 297, 74 USLW 3308 (2006). The denial of certiorari in *Boeken* demonstrates that Exxon is reading too much into the grant of certiorari in *Williams*, stretching and pulling the issues in that case as far as possible,

desperately trying to demonstrate that this case will somehow be affected by the Court's ultimate decision in *Williams*.

Once the Court properly removes the layers and layers of *Williams* "tie-ins" from Exxon's Petition for a Writ of Certiorari, there is little more to Exxon's petition than a general complaint about the outcome in this case (i.e., according to Exxon, the entire Louisiana court system erred, as a matter of law and on a constitutional level, by reducing the award from 18:1 to 2:1, instead of 1:1). That is far from sufficient to justify this Court exercising its supervisory review. As Supreme Court Rule 10 makes abundantly clear, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. Rule 10.

The decision of the Fourth Circuit Court of Appeals for the State of Louisiana is sound. It is a well-reasoned and detailed opinion that follows this Court's guidance in *BMW*, *Cooper*, and *State Farm* to the letter. There is simply no reason for the Fourth Circuit or a new jury (as suggested by Exxon) to reconsider the judgment in this case. Exxon's conduct was wanton and reckless under Louisiana law.[7] Petr. App. 48a. A Louisiana jury rendered a punitive award to punish and deter that conduct. Petr. App. 64a. The Louisiana Fourth Circuit reduced the award by almost $900 million, taking into consideration due process constraints. Petr. App. 57a. The Louisiana Supreme Court refused to grant writs and denied Exxon's subsequent stay application. Resp. App. 3a-4a. This Court

[7] In fact, the Fourth Circuit called Exxon's conduct "callous, calculated, despicable and reprehensible." Petr. App. 68a.

denied Exxon's stay application, taking into consideration the likelihood of a grant of certiorari and/or an ultimate reversal of the decision. *See Exxon Mobil Corporation v. Grefer, stay denied,* 126 S. Ct. 2056 (2006). Exxon is looking for relief that is not justified by the facts and the law in this case. Yet, Exxon continues to seek relief from this, the highest court in the land.

I. THE JURY'S CONSIDERATION OF THE RISKS POSED BY EXXON'S CONDUCT TOWARDS NON-PARTIES WAS PROPER; MOREOVER, THE LOUISIANA FOURTH CIRCUIT'S DECISION ENSURED THAT NON-PARTY HARM WAS NOT THE BASIS OF THE PUNITIVE AWARD, AND, CONSEQUENTLY, RESOLUTION OF THIS LAWSUIT SHOULD NOT BE PROLONGED PENDING A DECISION IN THE *WILLIAMS* CASE.

A. The Fourth Circuit's Decision Is Consistent With *State Farm* And *BMW* In All Respects.

At the outset of its first argument, Exxon details record evidence relating to the risks Exxon's conduct posed to the public, as well as jury instructions in any way referencing the risks Exxon's conduct posed to the public. Pet. 10. Exxon wants this Court to believe that the trial of this matter was "tainted" by improper evidence and instructions relating to non-parties and, by extension, the award must have been "tainted." Nothing could be further from the truth.

A preliminary problem with Exxon's position is that neither the evidence listed nor the jury instructions mentioned in Exxon's Petition were raised as a basis for reversal during Exxon's appeal. Petr. App. 14a. In fact, a

number of the "objectionable" exemplary damage instructions mentioned by Exxon in its Petition were *proposed by Exxon*. *See, e.g.*, R. 18:231; Resp. App. 1a-2a.

Another problem with Exxon's position is it ignores Louisiana law. Article 2315.3 of the Louisiana Civil Code (Resp. App. 5a) provided for punitive damages, during the time period in question, if the plaintiff's harm was caused by the "wanton or reckless disregard of *public safety* in the storage, handling, or transportation of hazardous or toxic substances." LA. CIV. CODE art. 2315.3 (Resp. App. 5a) (repealed 1996) (emphasis added). The evidence submitted by the Grefers relating to the risks to the public posed by Exxon's conduct was *required* to demonstrate a violation of this statute and, as such, was properly admitted.

Even if the risks posed to non-parties by Exxon's conduct was not required to demonstrate a violation of Louisiana Civil Code art. 2315.3 (it was), such evidence could be admitted as it was related to the reprehensibility of Exxon's conduct.[8] Under *BMW*, one of the factors to consider when determining the reprehensibility of a defendant's conduct is whether or not the conduct "evinced an indifference to or disregard of the health or safety of others." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 576-77 (1996). Consistent with that, *State Farm* instructs that the possible effects of a defendant's conduct on non-parties may be considered when assessing reprehensibility. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419-23 (2003). However, Exxon argues that the evidence considered falls under the exception to this rule because, according to Exxon, the conduct towards non-parties in

[8] This is one of the many reasons that the various instructions relating to such evidence were properly given.

this case has no "nexus to the specific harm suffered by the plaintiff." Pet. 11. This argument ignores the facts.

State Farm instructs that "evidence of other acts need not be identical to have relevance in the calculation of punitive damages." *State Farm*, U.S. 538 at 423. Faced with the Utah court's consideration of and reliance upon wholly unrelated out-of-state conduct, the Court also held that non-party conduct bearing "no relationship" to or having "nothing to do with" the harm to the plaintiff(s) cannot be used to support the constitutionality of a punitive award. *Id.* at 422, 424. In this case, Exxon's conduct towards the ITCO employees who worked at *the Grefer tract* and the homeowners who lived around *the Grefer tract* is inextricably intertwined with (and, in some instances, identical to) Exxon's conduct towards the Grefers and their property (i.e., *the Grefer tract*).

For twenty-four years, Exxon directed that its pipe service contractor clean used oilfield tubing contaminated with radioactive materials. R. 33:14-18, 34:48-52 ("The evidence in the record indicates that radioactive scale was discharged from the used oilfield pipes from the 1960s through 1992 when ITCO terminated its lease."); Petr. App 42a. This waste was distributed throughout the Grefer property during that time frame. Petr. App. 42a; R. 33:17-19, 33:38-41, 34:38, 34:48-52. When Exxon discovered that there was a risk associated with its operations, it did nothing to warn ITCO for almost a year and, in turn, *allowed the Grefer property to be further (and unrestrictively) contaminated during that time*. Petr. App. 5a-7a. The "warning" finally given, according to the record evidence, downplayed the risks and failed to fully inform ITCO about the problem. Petr. App.8a. ("Exxon's representatives made no mention of the possible build-up of radioactive

scale on ITCO's premises even thought it knew pipe scale had been accumulating on the premises for years and had learned in June 1986 that it was hazardous."), Petr. App. 47a; R. 36:151, 154, 46:46-50, 47:20. More importantly, Exxon *never* told the Grefers about the contamination at the site. It certainly never warned them about anything.[9] Rather, Exxon *continued* to send pipe to ITCO for cleaning at the Grefer property.[10] R. 47:39. *Six years later*, when Exxon finally decided that the potential liabilities associated with the continued disposal of radioactive material at the Grefer tract had become too great, it stopped sending pipe to ITCO (effectively putting it out of business) and abandoned the yard, *leaving its radioactive material at the*

---

[9] The record evidence indicates that the Grefers first learned of the existence of oil field radioactive waste on their property on October 29, 1996, when Judge Grefer, one of the four co-owners of the property, received a sampling report and laboratory analysis from the attorney of an ITCO worker confirming that the property was contaminated with Radium, a radioactive material. R. 20:4946-48. The surrounding neighborhood was likewise left in the dark by Exxon.

[10] After March of 1987, screening procedures were established by ITCO. R. 33:36-37; R. 46:52-53. However, the record evidence demonstrates these screening procedures did not prevent additional radioactive scale from contaminating the Grefer tract. As Mr. Waligora pointed out at trial, "you can't always tell what's in the pipe from an outside measurement." R. 36:167-68. For example, Exxon had taken a measurement outside of a pipe which read background, and when the scale inside the pipe was measured, it read 170 pCi/g. R. 38:132-36. Furthermore, ITCO's pipe measurements were fundamentally flawed as an ITCO worker testified that he usually obtained his background reading by sampling soil (one sample) approximately 10 to 15 feet away from where he was about to measure. R. 33:37. Inflated background readings can lead to the cleaning of pipe emitting unsafe levels of radiation. Finally, even the segregation process would have led to contamination. Trial testimony indicated that scale was frequently dislodged from pipes as they were moved from place to place. R. 33:41.

Grefer tract. Petr. App. 52a; R. 47:39-40. In short, the Grefers were left "holding the bag".

The Grefers, as the landowners, faced (and still face today) significant potential liabilities with respect to the ITCO workers and to the surrounding neighbors.[11] The Grefers also faced potential state and federal enforcement actions (as well as associated fines) for storing radioactive material without a license. *See, e.g.,* LA. ADMIN. CODE tit. 33, § 1401 et seq.; LA. REV. STAT. ANN. § 30:2025 (E)(1)(a). Not having the funds required to clean such extensive contamination, the Grefers' potential liabilities grew with each passing day. Given the significant cloud on their title, the Grefers could not even sell or transfer the property to stop the bleeding.

Certainly, Exxon's conduct towards ITCO, its workers and the surrounding neighbors has a "nexus" to the harm suffered by the Grefers.[12] As the Fourth Circuit held:

> . . . In reviewing an award of punitive/exemplary damages, we have the responsibility of looking to the callous, calculated, despicable and reprehensible conduct of Exxon during the time period in question. Even though this case is not a personal injury claim by the ITCO workers, the mindset of Exxon should be considered in deciding whether the sum awarded was appropriate. The fact that Exxon showed no regard for ITCO's workers, i.e., no concern for human safety, certainly *demonstrates that it had even less concern*

---

[11] While Exxon eagerly pointed out the cases it is being sued in as a result of its conduct at the Grefer tract, it failed to mention that *the Grefers are also defendants* in those suits. Pet. 11.

[12] "Nexus" is defined simply as a connection or a link. WEBSTER'S NEW COLLEGIATE DICTIONARY 569 (7th ed. 1963).

> *for the property damage that it caused, thus further demonstrating the morally culpable nature of its conduct. Grefer v. Alpha Technical*, 901, So.2d 1117, 1154-55 (La. App. 4th Cir. 2005), writ denied, 925 So.2d 1248 (La. 2006); Petr. App. 68a, (Emphasis supplied).

The Fourth Circuit's conclusion that a nexus exists between Exxon's conduct towards non-parties and the harm to the Grefers is amply supported by the record. For instance, Exxon's failure to tell *anyone* about the contamination at the Grefer tract (whether for one year in the case of ITCO or *never* in the case of the Grefers) not only put ITCO's workers and the surrounding neighbors at risk *but also led to further contamination of the Grefer tract.* Additionally, its failure to properly warn ITCO (when a warning was finally given) and its failure to implement adequate screening and handling procedures at the yard, not only put ITCO's workers and the surrounding neighbors at risk *but also led to even more contamination.* Most importantly, Exxon's failure to remediate its damage (at any point) not only put ITCO's workers and the surrounding neighbors at risk *but also left the Grefers with a huge mess.*[13]

---

[13] This was clearly a fact the Court considered during its reprehensibility analysis. When discussing the financial vulnerability factor, the Court found that the Grefers "are now financially burdened with the task of remediating the property." Petr. App. 51a. Later in its reprehensibility analysis, the Court also found that "Exxon took no step to remove the radioactive material" from the Grefer tract. Petr. App. 52a. Exxon's assertion that the Fourth Circuit found Exxon's conduct reprehensible based "solely" on "Exxon's failure to give timely notice to ITCO" is flatly controverted by these portions of the Fourth Circuit's reprehensibility analysis.

Additionally, the risk posed by Exxon's conduct towards ITCO's workers and the surrounding neighbors is *directly* related to the potential harm to the *Grefers*. To be specific, given the fact that the Grefers are *potentially liable to third parties under Louisiana law* (as owners of the property), the nature and extent of the risks posed to third parties demonstrates this potential harm to the Grefers and, in turn, is a valid consideration under the second *BMW* guidepost. *See State Farm*, 538 U.S. at 425 (confirming that the second BMW guidepost considers the ratio between the "harm, or potential harm, to the plaintiff and the punitive damages award").

Though Exxon quotes *State Farm* and *BMW* extensively, it fails to demonstrate that any portion of *State Farm* or *BMW* has been ignored or challenged. The reason for this is simple. The Fourth Circuit's opinion follows this Court's guidance to the letter.

B. Resolution Of The Issues This Court Deemed Worthy Of Review In *Williams* Would Have No Bearing On The Outcome Of This Case.

At the very beginning of its argument on the non-party harm issue, Exxon, pointing to the grant of certiorari in *Williams*, makes the following general statement: "The decision below presents a critical issue that this Court has already deemed worthy of review: whether due process permits a jury to punish a defendant for the effects of its conduct on non-parties." Pet. 9. There are a number of problems with Exxon's statement.

While Exxon properly cites the *second* issue this Court deemed worthy of review in *Williams*, it entirely ignores/disregards the *first* issue made subject to the grant

of certiorari. That first issue, which asks whether or not the reprehensibility guidepost can override an otherwise unconstitutional ratio, necessarily controls and limits the second issue. Put another way, utilizing reprehensibility (a guidepost that, in part, considers conduct directed at non-parties) to "trump" a ratio which, considering the harm to the *plaintiffs*, is constitutionally excessive, raises concerns that the award may be punishing a defendant for harms to non-parties. Limited by the first issue in this respect, the second issue appears far less expansive than Exxon suggests. After all, *standing on its own*, the issue of whether a defendant can be punished for harm to non-parties has already been answered by this Court. *See State Farm*, 538 U.S. at 423. It is an established rule of law that does not require the Court's review.[14] *See id.*

Appreciating the apparent scope of the second issue in *Williams*, the question becomes: What, if any, effect would resolution of that issue (or the first issue for that matter) have on this case? The answer is *none*.

In *Williams*, a smoker personal injury suit, the Oregon Supreme Court conceded that the almost 100:1 ratio in the case was constitutionally excessive *but then* held that the harm caused by Philip Morris' highly reprehensible conduct (much of it being extra-territorial conduct) justified the award.[15] *Williams v. Philip Morris, Inc.*, 127 P.3d

---

[14] Even if the Court intends to consider this issue in the more general sense asserted by Exxon, as will be discussed below, the punitive award does not punish Exxon for the effects of its conduct on non-parties. Consideration of that issue, therefore, would have no bearing on the outcome of this case.

[15] Extra-territorial conduct, a significant concern when considering the propriety of punitive damage awards (as the states are generally supposed to limit punishment to conduct within their respective borders), is not at issue under the facts of this case. The conduct at

(Continued on following page)

1165, 1181-82 (Or. 2006), *cert. granted*, 126 S. Ct. 2329, 74 USLW 3572, 74 USLW 3665, 74 USLW 3668 (2006) (No. 05-1256). In fact, the court specifically relied upon the harm to non-parties (most of whom did not live in Oregon) as its basis for upholding the award. *Id.* This is, at least arguably, a departure from the guidance of *BMW* and *State Farm*.

Unlike the almost 100:1 ratio in *Williams*, the 2:1 ratio in this case is not constitutionally excessive under *BMW* or *State Farm* (this issue is discussed extensively in Section III below). Furthermore, unlike the situation in *Williams*, *harm* to non-parties was never discussed or considered by the Fourth Circuit. Petr. App. 48a-57a. Even the *risk* posed to non-parties by Exxon's conduct was *only* considered during the court's reprehensibility analysis. Petr. App. 50a-55a. In fact, though it was not the reason for its reduction,[16] the court noted during its ratio analysis that the evidence of *risk* to the surrounding neighbors and Exxon's wealth (both properly before the jury under Louisiana law) possibly contributed to the ratio being constitutionally excessive.[17] Petr. App. 54a-55a. As the

---

issue in this case occurred *within Louisiana's borders, at a Louisiana property*. Petr. App. 10a.

[16] It is clear from a plain reading of the Fourth Circuit's decision that the reduction to 2:1 was based on this Court's ratio discussion in *State Farm* (and nothing else). Petr. App. 52a-53a ("Considering the substantial compensatory damages awarded in this case, in our opinion a lesser single digit ratio would be appropriate.").

[17] For the reasons set forth in Section I.A. above, the Grefers disagree with the Fourth Circuit's assertion that the evidence of risk to the surrounding neighbors was "irrelevant." Indeed, the court's statement conflicts with its holding that, to demonstrate a violation of article 2315.3, the Grefers had to prove that "the danger created by [Exxon's] wanton or reckless conduct threatened or endangered public safety." Petr. App. 44a.

Fourth Circuit expressed concern that the *risk posed to non-parties* may have factored into the jury's excessive punitive award, there is no possibility that the court relied on *non-party harm* as a basis for its punitive award in this case.[18] This is supported by the fact that the court focused solely on *the Grefers' actual harm* ($56,145,000) when it concluded that the $112,290,000 punitive award in this case is constitutionally permissible. Petr. App. 57a.

As reprehensibility was *not* used to support a constitutionally excessive ratio in this case, resolution of the issues in *Williams* will have no bearing on the Fourth Circuit's opinion. Moreover, given the fact that the 2:1 ratio in this case was based solely on the actual harm to the *plaintiffs*, there is no risk of duplicative punishment. For these reasons, in addition to the fact that Exxon's writ issue has no independent merit and should be denied, holding this case pending resolution of the *Williams* case would be entirely unwarranted.

II. THIS COURT HAS ALREADY HELD THAT THE STATES MAY CHOOSE THE PROCEDURE THEY DEEM APPROPRIATE TO ENSURE THAT PUNITIVE AWARDS COMPORT WITH DUE PROCESS, AND ANY PURPORTED CONFLICT IN THE LOWER COURTS EITHER IS A BY-PRODUCT OF THAT DISCRETION OR RELATES TO IMPROPER JURY CONSIDERATIONS NOT AT ISSUE IN THIS CASE.

Exxon *specifically requested* that the Fourth Circuit reduce the punitive award in this case. Petr. App. 14a.

---

[18] The Fourth Circuit made this point abundantly clear in its rehearing denial. Petr. App. 68a.

Nevertheless, Exxon now argues, without jurisprudential support, that due process protections entitled it to a new trial on punitive damages, rather than a reduction to constitutional limits. Pet. 18-19.

In an attempt to justify its argument, Exxon asserts, in very contradictory fashion, that the Court has not yet addressed the issue. To be specific, on the one hand, Exxon claims that "BMW asked this Court to address this issue . . . but it did not ultimately reach that issue." Pet. 18. On the other hand, Exxon recognizes that the Court held "therein" that the "appropriate remedy" for the constitutional error "is a matter that should be addressed by the state court in the first instance." *Id.* How can Exxon interpret that to mean that this Court did not reach the issue? Of course the Court reached the issue, and its answer was very clearly that the remedy is a matter of state concern. As the issue is a procedural one, this Court has left the choice between reducing an award to constitutional limits and ordering a new trial to the states. That is the current rule of law, and any conflict in the lower courts is a logical by-product of the various states handling procedure in the manner they deem appropriate. So long as due process protections are afforded by the state's procedure, this Court, under *BMW*, has indicated that it will not get involved.

The current rule of law, as established in *BMW*, is sound. The guideposts inherently protect against the courts considering non-party harm to justify an otherwise constitutionally excessive award. To be specific, the ratio analysis requires that the punitive award be proportionate to the actual and potential harm to the *plaintiff(s)*. *See State Farm*, 538 U.S. at 424. So, long as there is proportionality with respect to the *plaintiff's* harm, then the

court can rest assured that non-party harm is not at issue in the award (even if conduct directed towards non-parties was considered by the jury as an element of reprehensibility).[19] If, under state law, the lower court can achieve proportionality (where it is otherwise lacking) through a reduction to constitutional limits, this Court has indicated that such a procedure is acceptable. *See generally Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001).

Recognizing that the law on this issue is quite clear, Exxon argues that it should have received a new trial on the punitive damage award because the award was, according to Exxon, tainted by "improper" jury considerations. Pet. 19. The problem with this argument is that it is based entirely on an unsupported conclusion in an earlier Exxon argument (a by-product of trying to tie all its issues to the grant of certiorari in *Williams*). As was amply demonstrated in Section I above and, more to the point, in the Fourth Circuit's opinion, the evidence and instructions relating to the risks posed by Exxon's conduct towards non-parties were proper in light of both Louisiana Civil Code art. 2315.3 (Resp. App. 5a) and *BMW* reprehensibility considerations. Additionally, the evidence and instructions were proper because the risks posed by Exxon's conduct towards non-parties related directly to the *Grefers'* potential harm (i.e., potential legal liability). Exxon's argument, premised on the incorrect assumption that the evidence and instructions relating to conduct directed towards non-parties was improper, necessarily fails. The

[19] It is only when there is *not* proportionality and the court, nevertheless, upholds the award based on the reprehensibility guidepost (as was the case in *Williams*) that duplicative punishment issues arise.

four pages Exxon spends attempting to demonstrate a conflict in the lower courts over this issue are of no moment. Pet. 19-22. Even supposing those cases (the majority of which involve considerations of extra-territorial conduct not present in this case) demonstrate a valid conflict worthy of review, this case does not involve improper jury considerations. As such, there is no basis for this case to be the vehicle for that issue to be decided.

Moreover, Exxon's argument runs afoul of this Court's instruction in *Cooper*. Under *Cooper*, the constitutionality of punitive damage awards is to be reviewed *de novo*. *Cooper*, 532 U.S. at 436 ("Our decisions in analogous cases, together with the reasoning that produced those decisions, thus convince us that courts of appeals should apply a de novo standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards.").[20] Exxon entirely disregards the *Cooper* rule when it argues that a court can only *sometimes* decide for itself what award would be sufficient to alleviate due process concerns. In essence, Exxon wants *de novo* review when its interests are served by such review, but otherwise, it wants a new trial by jury. That is an entirely unreasonable position and one which does not merit this Court's review.

---

[20] The *Cooper* analysis mirrors Louisiana's long-existing law. The Louisiana Constitution provides for appellate review of both law and fact. When a Louisiana appellate court determines that trial errors may have influenced a jury's award, the appellate court is under a duty to review *de novo* the law and the facts and to render a judgment based upon that independent review. LA. Const. art. 5, § 10(B); *Temple v. Liberty Mutual Ins. Co., et al*, 330 So.2d 891, 892 (La. 1976) and *Riley v. Salley*, 874 So.2d 874, 878 (La. App. 4th Cir. 2004).

III. *STATE FARM* DID NOT IMPOSE A 1:1 CAP ON "SUBSTANTIAL" PUNITIVE DAMAGE AWARDS, AND EXXON'S ARGUMENTS THAT THERE IS A CONFLICT IN THE LOWER COURTS RELIES ENTIRELY ON THE EXISTENCE OF SUCH A CAP.

A. The 2:1 Ratio In This Case Is Entirely Consistent With *State Farm*.

Decided only three years ago, the *State Farm* decision provided further guidance with respect to the application of the *BMW* guidelines. For example, the Court instructed that "in practice, few awards exceeding a *single-digit ratio* between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm*, 538 U.S. at 425 (emphasis added). The Court also advised that "when compensatory damages are substantial, then a lesser ratio, *perhaps* only equal to compensatory damages, *can* reach the outermost limit of the due process guarantee." *Id.* (emphasis added). However, the Court "decline[d] again to impose a bright-line ratio which a punitive damages award cannot exceed." *Id.* It reaffirmed that "the precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Id.*

Exxon's argument that a 2:1 ratio in this case is excessive cuts against everything this Court held in *State Farm*. The Court did not state (or even imply) that 1:1 ratios are the absolute limit in substantial damage cases.[21]

---

[21] The history of the *State Farm* case after this Court rendered its opinion supports the Grefers' position. Following the Utah Supreme Court's reconsideration of the punitive award against State Farm and consequent reduction to *a 9:1 ratio*, this Court denied writs. *Campbell*

(Continued on following page)

BEST A

It if it had intended to do that, it would not have said "*perhaps* only equal to compensatory damages" and "*can* reach the outermost limit of the due process guarantee." It certainly would not have declined again to impose a bright line ratio which punitive damages cannot exceed. Yet, Exxon argues fervently that there is a cap, and it is 1:1. Pet. 25, 28. Exxon is incorrect.

This is evidenced by the fact that this Court, only three months ago, refused to grant certiorari in the *Boeken* case, a smoker personal injury suit involving a 9:1 ratio between punitive damages ($50,000,000) and compensatory damages (approximately $5,500,000). *Boeken v. Philip Morris, Inc.*, 127 Cal. App. 4th 1640, 26 Cal. Rptr. 3d 638 (Cal. App. 2nd Dist. 2005), *cert. denied*, 126 S. Ct. 1567, 164 L.Ed.2d 297, 74 USLW 3308 (2006). Surely, a 9:1 ratio case involving such a substantial punitive damage award would have led to a grant of certiorari if the Court had intended to impose a 1:1 cap under *State Farm*. The fact that certiorari was denied in *Boeken* demonstrates that the 2:1 ratio in *this* case is not constitutionally excessive.[22] Exxon may want there to be a bright-line limit on punitive damage awards, but, as is evidenced by the *State Farm* decision and the denial of certiorari in *Boeken*, this Court is not willing to do that.

---

v. State Farm Mut. Auto. Ins. Co., 98 P.3d 409 (Utah), *cert. denied*, 543 U.S. 874 (2004).

[22] Consideration of the potential harm to the Grefers (e.g. potentia liability to ITCO's workers and the surrounding neighbors, potentia enforcement actions by environmental agencies, potential state an federal fines, etc. . . .) further supports the constitutionality of th punitive award in this case. After all, when the potential harm to th Grefers is added to the equation, as *BMW* instructs the courts to do, th ratio in this case is even lower than 2:1. *BMW*, 517 U.S. at 581.

AILABLE COPY

Recognizing that its argument that *State Farm* imposed a 1:1 ratio limit on substantial damage awards is a stretch among stretches, Exxon falls back to another (even less credible) argument. Specifically, Exxon asserts that, because the Grefer property only has a market value of $1.5 million, the ratio in this case is actually much higher than 2:1. Pet. 26, 29. This argument is thoroughly flawed. To begin with, it disregards the fact that there are no cases which have held that actual harm, for purposes of a punitive damage analysis, can be limited to certain portions of a compensatory award. Indeed, both *BMW* and *State Farm* confirm that the compensatory award, as a whole, comprises the plaintiff's actual harm. *BMW*, 517 U.S. at 580 ("[E]xemplary damages must bear a 'reasonable relationship' to compensatory damages."); *State Farm*, 538 U.S. at 425 ("ratio between punitive and compensatory damages"). The lower courts are consistent on this point.[23]

Exxon cannot dispute that the compensatory portion of this award, pursuant to the Louisiana Fourth Circuit's final and executable judgment, is $56,145,000.00. In fact, recognizing that there is no basis to challenge the compensatory award in this Court, Exxon has already paid that amount to the Grefers. In short, the actual harm in this case has been established by the Louisiana courts, and that amount has been satisfied. Exxon is foreclosed from arguing to this Court that a lesser amount is somehow the "true" measure of the Grefer's harm in this case.

---

[23] Tellingly, all of the cases cited by Exxon at pages 26-27 of its Petition relate to the lower courts' consideration of the ratio between "punitives" and "*compensatories*." Pet. 26-27 (emphasis added).

Moreover, Exxon's argument ignores the fact that, under Louisiana law, plaintiffs are entitled to have their property restored, even if the cost of the remediation plan exceeds the value of the land.[24] *Roman Catholic Church of the Archdiocese of New Orleans v. Louisiana Gas Serv. Co.*, 618 So.2d 874, 879-80 (La. 1993). In other words, Louisiana law instructs that the Grefers' actual harm is the cost of clean-up.[25]

Common sense says the same thing. Without the $56 million restoration award in this case, the Grefers would not be in a position to conduct a clean-up that ensures that their entire property complies with state and federal

---

[24] The limitations on this allowance are that the landowner must have "a reason personal . . . for restoring the property" or there must be "a reason to believe that the plaintiff will, in fact, make the repairs." *Roman Catholic Church*, 618 So.2d at 879-80. In this case, the jury found that at least one of these requirements was met and, in turn, awarded the amount it determined to be reasonable and necessary to effectuate a complete remediation of the Grefer tract. The Fourth Circuit agreed with the jury's assessment. App. 38a. Given the site history at the Grefer tract (a history involving twenty-four years of non-homogeneous burial of radioactive material), the Grefers properly demanded that *all* of their property (not less than 1%, as suggested by Exxon) be cleaned in conformance with both state and federal radiation regulations. This was the only way to ensure that the Grefers would be protected from not only environmental enforcement actions but also continuing liability to the vicinage. Exxon's argument that such an award is "grossly inflated" defies logic. Pet. 28. Exxon's attempt to interject the commentary of the Louisiana Department of Environmental Quality in "support" of its untenable position is misleading. Pet. 28-29. Indeed, it is difficult to think of a worse advocate for Exxon's position. The Louisiana DEQ is the same agency that, *as evidenced by the testimony of a DEQ employee at trial*, failed to enforce the Louisiana Radiation Regulations with respect to Exxon's activities at the Grefer tract for over two decades. R. 29:41, 32:117, 32:121-22, 32:135, 32:139, 32:141-42, 32:145, 33:184-87, 36:135, 36:169-70.

[25] Exxon does not challenge the constitutionality of this substantive law.

standards. In turn, the Grefers would be saddled with virtually never ending liability, and their actual and potential harm would *increase* with each passing day.[26] The Grefers would not be able to prevent new civil lawsuits, and they would have no way of complying with government enforcement actions. How can such an award not be considered the Grefer's actual harm?

B. The Fact That Every Substantial Punitive Damage Award Since *State Farm* Has Not Resulted In A 1:1 Ratio Does Not Mean That This Court Needs To Resolve A Conflict In The Lower Courts.

Exxon attempts to demonstrate a conflict in the lower courts with respect to the proper application of the *State Farm* decision by string citing punitive damage cases with varying results.[27] Pet. 26-27. Exxon's hope, of course, is that the "inconsistency" of those decisions will encourage this Court to instruct the lower courts that a strict 1:1 cutoff should be enforced in substantial damage cases. As was discussed above, it cannot be reasonably disputed that such an instruction would run counter to this Court's guidance in *State Farm*. This conclusion is supported by the fact that the *exact same request* was made in *Boeken*,

---

[26] Radium-226 has a half-life of approximately 1600 years. R. 32:144.

[27] Looking for another tie-in, Exxon cites the *Williams* decision as its example of an extreme departure from *State Farm*. Pet. 27. It is ironic, however, that Exxon attempts to tie this issue into the grant of certiorari in *Williams*. Had Exxon carefully read Philip Morris' brief in the *Williams* case, it would have seen that Philip Morris argued that the 2:1 ratio in *this* case conforms with the Court's guidance in *State Farm*. Brief for Petitioner at 13, *Philip Morris USA v. Williams*.

and the Court denied certiorari. Brief for Petitioner at 14 *Philip Morris USA v. Boeken*.

Although *State Farm* does not say what Exxon asserts it does, there is another reason that the purported inconsistency in the lower courts does not merit this Court's review. As Justice Kennedy pointed out in his concurrence in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991):

> Some inconsistency of jury results can be expected for at least two reasons. First, the jury is empaneled to act as a decisionmaker in a single case, not as a more permanent body. As a necessary consequence of their case-by-case existence, juries may tend to reach disparate outcomes based on the same instructions. Second, the generality of the instructions may contribute to a certain lack of predictability. The law encompasses standards phrased at varying levels of generality. As with other adjudicators, the jury may be instructed to follow a rule of certain and specific content in order to yield uniformity at the expense of considerations of fairness in the particular case; or, as in this case, the standard can be more abstract and general to give the adjudicator flexibility in resolving the dispute at hand. *These features of the jury system for assessing punitive damages discourage uniform results, but nonuniformity cannot be equated with constitutional infirmity.* (emphasis added at 41)

Because this Court has properly refused to impose a bright line limitation on punitive awards, such awards are bound to vary to some degree. However, this variance, as Justice Kennedy points out, "cannot be equated with constitutional infirmity." The cases cited by Exxon do not demonstrate a need for this Court's review. Moreover, this

case, which comports with *State Farm* in all respects, is not the appropriate vehicle for such a review.

CONCLUSION

Exxon's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

STUART H. SMITH
MICHAEL G. STAG
SMITH STAG, L.L.C.
365 Canal Street, Suite 2850
New Orleans, Louisiana 70130
(504) 593-9600

STEPHEN B. MURRAY
(Counsel of Record)
ARTHUR M. MURRAY
MURRAY LAW FIRM
909 Poydras Street, Suite 2550
New Orleans, Louisiana 70112
(504) 525-8100

ANDREW B. SACKS
JOHN WESTON
LAW OFFICES OF ANDREW B. SACKS AND ASSOCIATES
114 Old York Road
Jenkintown, Pennsylvania 19046
(215) 925-8200

JACK W. HARANG
HARANG & BARKER, L.L.C.
3500 N. Hullen Street
Metairie, Louisiana 70002
(504) 456-8658

RON A. AUSTIN
AUSTIN & ASSOCIATES, L.L.C.
400 Manhattan Avenue
Harvey, Louisiana 70058
(504) 436-7844

RALPH R. ALEXIS, III
PORTEOUS, HAINKEL & JOHNSON, L.L.P
704 Carondelet Street
New Orleans, Louisiana 70130
(504) 581-3838

Dated: July 24, 2006

APPENDIX

APPENDIX A

EXXONMOBIL'S PROPOSED INSTRUCTION 17

EXEMPLARY DAMAGES - GENERALLY

In this particular case, Louisiana law permits you t consider an additional element of damages called exem plary damages (or called "punitive damages" in othe states).

~~You may only award exemplary damages if the plain tiffs prove, by a preponderance of the evidence, that:~~

~~(1) the defendant's conduct was wanton and reckless;~~

~~(2) the danger created by the defendant's wanton and reckless conduct threatened or endangered public safety;~~

~~(3) the defendant's wanton and reckless conduct occurred in the storage, handling, or transportation of hazardous or toxic substances; and~~

~~(4) The plaintiffs' damages were caused by the defendant's wanton and reckless conduct.~~

The phrase "wanton and reckless" means a consciou indifference to consequences, amounting almost to willingness that harm to the public safety would follow Stated another way, wanton and reckless conduct is tha which amounts to intentional and deliberate action tha has the character of outrage frequently associated wit crime.

Unless you find that the defendants acted with almos a willingness that harm to the public safety would follow then you may not award exemplary damages.

~~Even if you decide that the plaintiffs are entitled to exemplary damages, you may not award such damages for conduct that the defendants engaged in before 1984 or after 1996. [Illegible] Louisiana law, the plaintiffs are not entitled to exemplary damages for conduct that the defendants engaged in before 1984 or after 1996.~~[13]

[Under Louisiana the πs may be entitled to ~~punitive~~ exemplary damages only for conduct that the defendants engaged in between 1984 and 1996.]

[4474]

EXXONMOBIL'S PROPOSED INSTRUCTION 18

EXEMPLARY DAMAGES – DISCRETIONARY

Exemplary damages are within your discretion. This means that even if you find that the defendants' conduct was wanton or reckless, you are not required to award exemplary damages to the plaintiffs.[14]

---

[13] Johnson, *Louisiana Civil Law Treatise, Civil Jury Instructions*, § 18.02; *Oubre v. Union Carbide Corp.*, 747 So.2d 22, 227 (La. App. 5th Cir. 1999); *Adams v. Marathon Oil Co.*, 688 So.2d 75, 76 n.2 (La. App. 5th Cir. 1997); *Haydel v. Herclules Transport, Inc.*, 654 So.2d 418, 438-39 (La. App. 1st Cir. 1995); *Landry v. Uniroyal Chemical Co., Inc.*, 653 So.2d 1199, 1205 (La. App. 1st Cir. 1995); *Lasha v. Olin Corp.*, 634 So.2d 1354, 1361 (La. App. 3d Cir. 1994); *Fuselier v. Amoco Production Co.*, 607 So.2d 1044, 1050 (La. App. 3d Cir. 1992); *Griffin v. Tenneco Oil Co.*, 531 So.2d 498 (La. App. 4th Cir. 1988).

[14] Johnson, *Louisiana Civil Law Treatise, Civil Jury Instructions*, § 13.02.

[4475]

APPENDIX B

Supreme Court
[SEAL] STATE OF LOUISIANA
New Orleans

PASCAL F. GALOGERO, JR. 400 Royal Street
CHIEF JUSTICE New Orleans, LA 70130

JOHN TARLTON OLIVIER TELEPHONE (504) 310-23(
CLERK OF COURT HOME PAGE
http://www.lasc.org

April 24, 2006

Hon. Dale N. Atkins, Clerk
Orleans Parish – Civil District Court
421 Loyola Ave.
Suite 402
New Orleans, LA 70112

In Re: Grefer, Joseph etal
vs. Alpha Technical eta
No: 2005-C-1590

Dear Ms. Atkins:

This is to advise that the Court took the following acti on the Motion to Stay Execution of Judgment filed in t above entitled matter:

"Motion for Stay is Denied."

Victory & Weimer, JJ. would grant.

With kindest regards, I remain,

Very truly yours,

John Tarlton Olivier
Clerk of Court

/s/ Katherine A. Fontana
By: Katherine A. Fontana
Deputy Clerk of Court

KAF:rtd

ccs: All Counsel

Court of Appeal, Fourth Circuit, Number 2002-1237
Civil District Court Div. "A" Number 97-15004

APPENDIX C

La. C.C. art. 2315.3

Art. 2315.3. Additional damages, storage, handling, a transportation of hazardous substances

In addition to general and special damages, exemplı damages may be awarded, if it is proved that plaintif injuries were caused by the defendant's wanton or reckl disregard for public safety in the storage, handling, transportation of hazardous or toxic substances. As us in this Article, the term hazardous or toxic substan shall not include electricity.

(Repealed by Acts 1996, 1st Ex. Sess., No. 2, § 1, April 1996.)

REPLY BRIEF

FILED
AUG 7 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1670

IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION,
Petitioner,

v.

JOSEPH GREFER ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Louisiana Court of Appeal, Fourth Circuit

REPLY BRIEF FOR PETITIONER

GLEN M. PILIE
RONALD J. SHOLES
LOUIS C. LACOUR, JR.
MARTIN A. STERN
ADAMS AND REESE LLP
4500 One Shell Square
New Orleans, Louisiana 70139
(504) 581-3234

WALTER DELLINGER
(*Counsel of Record*)
JOHN F. DAUM
JONATHAN D. HACKER
NICOLE A. SAHARSKY
NIKHIL SHANBHAG
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

ARGUMENT 1

I. THE CONCEDED CONFLICT REGARDING HARM TO NON-PARTIES IS SQUARELY IMPLICATED IN THIS CASE 1

II. THERE IS AN UNRESOLVED CONFLICT REGARDING HOW TO REMEDY IMPROPER CONSIDERATION OF HARMS TO NON-PARTIES 5

III. THERE IS SIGNIFICANT DISAGREEMENT ON THE CONSTITUTIONAL MAXIMUM IN CASES OF SUBSTANTIAL COMPENSATORY DAMAGES 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES

BMW of N. Am., Inc. v. Gore,
517 U.S. 559 (1996) 6

Cooper Indus., Inc. v. Leatherman Tool Group, Inc.,
532 U.S. 424 (2001) 6

Orr v. Orr,
440 U.S. 268 (1979) 5

Pac. Mut. Life Ins. Co. v. Haslip,
499 U.S. 1 (1991) 9

State Farm Mut. Auto. Ins. Co. v. Campbell,
538 U.S. 408 (2003) ..... *passim*

STATUTES

La. Civ. Code art. 2315.3 3

OTHER AUTHORITIES

Robert L. Stern et al., *Supreme Court Practice* (8th ed. 2002) 5

REPLY BRIEF FOR PETITIONER

Plaintiffs do not – and cannot – deny that there is substantial disagreement in the lower courts regarding whether due process permits a jury to punish a defendant for its conduct toward non-parties. Plaintiffs likewise do not deny that there are conflicts in the lower courts regarding the appropriate remedy for improper consideration of third-party conduct and regarding the due process limits when compensatory damages are substantial. The *only* grounds for plaintiffs' opposition are their arguments that the conceded conflicts are not implicated by this case. But they are. Indeed, this case is an *ideal* vehicle to address those conflicts: plaintiffs received a $1 billion punitive damages award by scaring the jury with outlandish tales of unadjudicated potential harms to non-parties, and the Court of Appeal upheld the award, after reducing it to $112 million, based only on risks to non-parties. Plaintiffs' new attempts to manufacture support for the enormous award cannot obscure the significant issues here that warrant this Court's attention.

ARGUMENT

I. THE CONCEDED CONFLICT REGARDING HARM TO NON-PARTIES IS SQUARELY IMPLICATED IN THIS CASE

There is a clear conflict in the lower courts over whether due process allows punitive damages to be based on risks to non-parties, and it will be addressed in *Philip Morris USA v. Williams*. The decision below exacerbates that conflict because it upholds punitive damages based entirely on risks posed to ITCO employees, and it exposes ExxonMobil to a concrete risk of multiple punishment. This Court should grant review and hold that ExxonMobil cannot be punished for risks to non-parties. Alternatively, it should hold the petition pending *Williams*.

1. Plaintiffs concede the conflict in the lower courts over the circumstances under which a jury may consider harm to non-parties in adjudicating punitive damages, but they assert that the conflict is not implicated here because questions of harm to non-parties "simply are not issues in this case." Opp. Br. 9. Nothing could be further from the truth. At trial, plaintiffs "argue[d] and present[ed] substantial evidence . . . of the potential and/or alleged actual harm to other persons who were not parties to this suit." App. 53a. The jury instructions focused on risks to non-parties and made harms to the plaintiffs a secondary factor at best. *Id.* at 75a. The Court of Appeal upheld the award based *entirely* on ExxonMobil's nine-month delay in notifying ITCO of the risks posed by NORM, even though the delay had no effect on plaintiffs' "strictly economic harm." *Id.* at 50a-52a, 68a. And in their opposition to certiorari, plaintiffs *continue* to utilize risks to non-parties to justify punitive damages.[1]

2. Plaintiffs alternatively suggest (at 12) that the court below properly relied on potential harm to non-parties because that evidence "was related to the reprehensibility of Exxon's conduct." Plaintiffs are incorrect. Although effects of a defendant's conduct on non-parties may be considered in assessing reprehensibility when the defendant's conduct has similarly affected the plaintiffs, recklessness toward non-parties cannot supply the predicate for punitive damages when there is no similar recklessness toward the plaintiffs. Pet. 12. That necessary predicate is completely lacking here.

Plaintiffs argue (at 15-16) that evidence of ExxonMobil's recklessness toward ITCO was relevant to the reprehensibility of ExxonMobil's conduct toward plaintiffs because it showed ExxonMobil's general disregard for public safety.

---

[1] *See* Opp. Br. 1 (property "is adjacent to a residential community"); *id.* at 13 (ExxonMobil "did nothing to warn ITCO for almost a year" and "failed to fully inform ITCO about the problem"); *id.* at 16 (ExxonMobil "put ITCO's workers and the surrounding neighbors at risk").

That argument proves too much. If recklessness toward third parties suffices to establish reprehensibility as to the plaintiff, then risks to non-parties would always suffice to justify punitive damages. This Court has squarely rejected that contention: "A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003).

Further, plaintiffs suggest that punitive damages were properly based on plaintiffs' "potential[] liab[ility] to third parties under Louisiana law." Opp. Br. 17. First, plaintiffs' "potential liability" was not the reason that the appellate court upheld the award; the appellate court focused solely on risks to ITCO employees. Second, there is no record evidence establishing the nature and extent of those potential harms. Punitive damages must be based on "harm suffered by the plaintiff." *State Farm*, 538 U.S. at 418. Upholding punitive damages based on plaintiffs' belated, wholly unsupported, and purely speculative assertion of potential harms would open a tremendous loophole in *State Farm*, effectively eviscerating this Court's limits on punitive damages.

Plaintiffs also argue (at 12) that the punitive damages award was permissible under Louisiana Civil Code Article 2315.3 and thus constitutional. But it is far from clear that Article 2315.3, which has since been repealed, would allow use of harms to non-parties completely unmoored from harms to the plaintiffs. More fundamentally, the fact that state law may have required the jury instructions given only raises the constitutional question; it does not answer it.

3. Plaintiffs half-heartedly suggest (at 11) that even if the jury improperly considered risks to non-parties, the Court of Appeal "ensured that non-party harm was not the basis of the punitive award." That is incorrect. The Court of Appeal did not justify plaintiffs' punitive damages based on their harm, which everyone agreed was "strictly economic." App.

50a. Rather, it based them on ExxonMobil's "nine-month delay in notifying ITCO . . . of the dangers posed from handling NORM contaminated equipment" which "put [ITCO] employees at risk." *Id.* The appellate court's entire reprehensibility discussion focused on *ITCO*.[2] On petition for rehearing, the Court of Appeal identified the basis for punitive damages as "put[ting] ITCO's employees at risk," and it explicitly rejected ExxonMobil's argument that "harm to third parties cannot be punished." *Id.* at 68a.

4. Next, plaintiffs argue (at 17-19) that certiorari review is not appropriate because the second question presented in *Williams* is necessarily limited by the first question presented, and this Court's resolution of *Williams* will only affect cases in which the court below has used "the reprehensibility guidepost [to] override an otherwise unconstitutional ratio." In plaintiffs' view, so long as the ratio of punitive damages to actual harm is within permissible bounds, the punitive damages award *must* have been based on harms to the plaintiffs, and it does not matter what evidence the jury *actually* considered in assessing reprehensibility.

Plaintiffs cannot possibly be correct, because even they admit that *State Farm* places limits on the jury's consideration of the effects of the defendant's conduct on non-parties. Opp. Br. 18. As this Court said in *State Farm*: "Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant." 538 U.S. at 423. Plaintiffs' argument simply begs the question raised here and in *Williams*: After *State Farm*, when, if ever, may a factfinder consider

---

[2] *See, e.g., id.* at 50a-51a (NORM "posed a health hazard" to ITCO); *id.* at 51a (delay "le[ft] ITCO with the mess"); *id.* ("ITCO's business steadily declined"); *id.* at 52a (delay "posed a direct danger to the physical health and safety of those workers").

harms to non-parties in awarding punitive damages?[3] That question has generated substantial disagreement; it is ripe for review; and it is critical to the outcome in this case.

5. Finally, plaintiffs suggest (at 11-12) that the issue of risks to non-parties is not properly before this Court. ExxonMobil pressed that argument before the Court of Appeal, and the argument was passed on by the Court of Appeal. *See* Brief of Appellant ExxonMobil Corp. at 29-34, *Grefer v. Alpha Technical*, No. 2002-CA-1237 (La. Ct. App. Dec. 30, 2002) ("ExxonMobil Br.") ("[T]he trial court impermissibly allowed Plaintiffs to present evidence of potential and/or alleged actual harm to other persons who were not parties to this lawsuit and whose claims were not before this jury."); App. 14a (Assignment of Error No. 6); *id.* at 50a-52a, 68a (rejecting argument that "harm to third parties cannot be punished" under *State Farm*). The issue is thus within this Court's certiorari jurisdiction. *See Orr v. Orr*, 440 U.S. 268, 274-75 (1979); *see also* Robert L. Stern et al., *Supreme Court Practice* 175-76 (8th ed. 2002).

II. THERE IS AN UNRESOLVED CONFLICT REGARDING HOW TO REMEDY IMPROPER CONSIDERATION OF HARMS TO NON-PARTIES

The jury's award in this case was tainted by the consideration of improper evidence, and that taint was not remedied by the appellate court's reduction of the punitive damages award. As explained in the petition (at 22-25), due process limits on punitive damages include both a substantive and a procedural component. *See State Farm*, 538 U.S. at 416. Those different limitations require different reme-

---

[3] Plaintiffs' attempt to distinguish this case from *Williams* suffers from a second flaw: it confuses the substantive limits on the amount of punitive damages with the procedural limits on consideration of certain evidence. A failure of procedural due process cannot be cured by reducing the resulting punitive damages award. *See infra* pp. 5-6.

dies. When a punitive damages award exceeds the constitutional maximum for the conduct at issue, that defect may be cured by reducing the award. But when a punitive damages award is constitutionally infirm due to improper evidence or instructional error, reduction of the jury's tainted award is insufficient because there is no way for the reviewing court to know how the improper evidence or instructions affected the jury's award. Plaintiffs do not address this important distinction at all. Nor do they take issue with the cases that demonstrate the substantial and mature conflict in the lower courts on this issue. Instead, they suggest that review by this Court is unnecessary for other reasons.

1. Plaintiffs first contend that this Court squarely reached the remedy issue in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and adopted a "rule of law" that "the choice between reducing an award to constitutional limits and ordering a new trial" in all cases is left "to the states." Opp. Br. 21. Plaintiffs completely misunderstand this Court's statement in *BMW*. The Court had already determined that the punitive damages award was "grossly excessive" and that the case should be remanded to the Alabama Supreme Court for further proceedings. 517 U.S. at 585-86. Rather than be the first court to address whether the appropriate remedy was a new trial or remittitur, the Court asked the state court to consider that question "in the first instance." *Id.* The Court did not hold that state courts always may decide the proper remedy for themselves; it simply asked *one* court in *one* particular case to answer a constitutional question before this Court would address it.

2. Plaintiffs also claim (at 23) that the resolution of the remedy question is dictated by *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). Plaintiffs contend that because *Cooper* mandates *de novo* review of the constitutionality of punitive damages awards in all cases, there cannot be different remedies for different types

of constitutional violations. But *Cooper*'s *de novo* review requirement merely answers the question of what deference an appellate court should give to a trial court on the constitutional issues; it does not answer the substantive question of what the Constitution requires. When a reviewing court determines that a punitive damages award is tainted because of improper evidence or instructions, it has performed the appellate function contemplated by *Cooper*. The next question – the proper remedy – is a substantive constitutional question not addressed in *Cooper*. But this Court's other teachings, as well as the common-law limitations on remittitur, indicate that the proper remedy is a new trial.

Plaintiffs' related suggestion (at 23 n.20) that Louisiana law provides an adequate remedy for improper consideration of risks to non-parties is likewise misguided. Even assuming that Louisiana appellate courts may review the facts in a case *de novo* and render a judgment, that is not what the Court of Appeal did here. The Court of Appeal *approved* the jury's use of risks to ITCO employees to award punitive damages and rejected ExxonMobil's argument as "an incorrect and exceedingly narrow reading of *Campbell*." App. 68a. It attempted to remedy the problem of excessiveness by reducing the award to what it believed to be the constitutional maximum, but it provided no cure for the jury's consideration of harms to non-parties.

3. Next, plaintiffs renew their argument that if the ratio of punitive damages to actual harm is a single digit, "then the court can rest assured that non-party harm is not at issue in the award" – "*even if* conduct directed toward non-parties was considered" by the jury. Opp. Br. 21-22 (emphasis added). First, plaintiffs' statement (at 20) that "the 2:1 ratio in this case was based solely on the actual harm to the *plaintiffs*" is incorrect as a factual matter. The Court of Appeal explicitly relied on risks to ITCO in upholding the punitive damages award. *See supra* pp. 3-4.

Second, when a jury considers risks to non-parties and then returns a punitive damages award of twice the compensatory damages, one simply cannot know the basis for the award in the absence of a special verdict. The jury could have awarded the entire amount based on harms to the plaintiffs; it could have awarded the entire amount for risks posed to non-parties; or it could have decided to punish the defendants once for risks to the plaintiffs and once for risks to others. Only the first outcome is constitutionally permissible, yet there is no way to ensure that it is what happened.

4. Finally, plaintiffs suggest that there is no error because "Exxon *specifically requested* that the Fourth Circuit reduce the punitive award in this case." Opp. Br. 20. ExxonMobil asked the Court of Appeal to "vacate[] or reduce[]" the award "to comport with due process," App. 14a, because it argued *both* that the $1 billion jury award was substantively excessive and that it was impermissibly premised on risks to non-parties. *See* ExxonMobil Br. 31-35. The Court of Appeal agreed that the award was substantively excessive and reduced it, but it disagreed about risks to non-parties. Had the Court of Appeal agreed with ExxonMobil, it should have vacated the award and ordered a new trial.

III. THERE IS SIGNIFICANT DISAGREEMENT ON THE CONSTITUTIONAL MAXIMUM IN CASES OF SUBSTANTIAL COMPENSATORY DAMAGES

Even if the punitive damages award had been based entirely on harms to the plaintiffs, it would be excessive. Plaintiffs received an undeniably "substantial" award of restoration costs – 37 times their economic loss. In such a case, punitive damages are only justified if there is a reason for additional punishment and deterrence, and the amount of punitive damages should not exceed the plaintiffs' actual harm.

1. Plaintiffs essentially admit (at 28-29) that there is significant disagreement in the lower courts on the maximum punitive damages allowed when compensatory damages are

substantial. They argue only that the disagreement does not warrant review because it is due to the fact that juries sometimes "'reach disparate outcomes based on the same instructions.'" Opp. Br. 29 (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 41 (1991) (Kennedy, J., concurring in the judgment)). ExxonMobil does not contend that this Court should intervene any time different juries reviewing similar conduct award different amounts of punitive damages. The problem here is that the lower courts have adopted conflicting rules of law regarding the constitutional upper limit on punitive damages in cases of substantial compensatory damages. Plaintiffs make no attempt to harmonize those rules.

2. Plaintiffs also argue (at 24-25) that *State Farm* does not require a 1:1 ratio of punitive damages to actual harm in all cases of substantial compensatory damages. What *State Farm* does make clear is that punitive damages must further a "legitimate purpose," such as punishment or deterrence. 538 U.S. at 417. Large compensatory damages awards have a deterrent function in themselves, *id.* at 426, so punitive damages "should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of *further* sanctions to achieve punishment or deterrence," *id.* at 419 (emphasis added). When there is a substantial compensatory damages award, it is unlikely that additional punishment and deterrence are required, and that is why this Court suggested that a 1:1 ratio of punitive damages to actual harm is the constitutional maximum. *Id.* at 425.

Applying *State Farm*'s teaching to this case, there is no reason why additional punishment is required on top of the enormous $56 million restoration costs award. Plaintiffs' economic injury was more than fully remedied by an award that allows them to restore their property to their own specifications. App. 50a. The only reason plaintiffs offer for further punishment and deterrence is the risk of harm to non-

parties, and that cannot constitutionally be the only basis for the award.

Plaintiffs focus on this Court's denial of certiorari in *Boeken v. Philip Morris*, stating that it "demonstrates that the 2:1 ratio in this case is not constitutionally excessive." Opp. Br. 25. But of course a denial of certiorari has no precedential value. Equally significant, *Boeken* was a *personal injury* suit. A key reason why 1:1 is the maximum permissible ratio here is that plaintiffs suffered "only property damage," App. 53a, and reprehensibility is lessened when the plaintiffs' harm is "economic" rather than "physical," *State Farm*, 538 U.S. at 419.

3. Finally, plaintiffs try to justify the punitive damages award by arguing that their actual harm was the $56 million restoration costs award, not the $1.5 million value of their property. Opp. Br. 26-27. It is the "harm suffered by the plaintiff" that must be proportional to the punitive damages award. *State Farm*, 538 U.S. at 418. In many cases, the compensatory damages approximate the plaintiff's harm. In this case, they do not, because the plaintiffs' only "loss" is the $1.5 million value of their property. They did not lose $56 million, nor have they incurred any obligation to pay $56 million. The $56 million results simply from a special feature of Louisiana law allowing plaintiffs to recover restoration costs, even though they do not in any legal or colloquial sense "compensate" plaintiffs for any loss in value of the property. Having been fully compensated for the loss in value of their property, any additional money plaintiffs receive to restore the property to its prior condition is actually a windfall. The restoration costs award thus does not reflect any harm to which the punitive damages award properly may be compared.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GLEN M. PILIE
RONALD J. SHOLES
LOUIS C. LACOUR, JR.
MARTIN A. STERN
ADAMS AND REESE LLP
4500 One Shell Square
New Orleans, Louisiana 70139
(504) 581-3234

WALTER DELLINGER
(*Counsel of Record*)
JOHN F. DAUM
JONATHAN D. HACKER
NICOLE A. SAHARSKY
NIKHIL SHANBHAG
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Dated: August 7, 2006